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No. 95-518

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA,
Petitioner,
v.
U.S. PHILIPS CORPORATION,
NORTH AMERICAN PHILIPS CORPORATION and
N.V. PHILIPS GLOEILAMPENFABRIEKEN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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In accusing Petitioner Izumi of "duplicity," "misrepresentation," "obfuscation," assault on "the integrity of the judicial process," "abuse of the judicial system," "deception" and "fraud," the Philips Respondents' Brief in Opposition stoops to a level of mudslinging that has no place in this or any other Court and has no basis in any of the decisions below.[1] We trust that the Court will

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[1] That these charges are unfounded is evidenced by the fact that there is not a word in either the District Court or the Court of Appeals opinion suggesting any basis for them. The Court of Appeals majority opinion merely found judicial estoppel, which carries no suggestion of turpitude. Senior Circuit Judge Friedman's dissent disagreed with even that characterization and would have reversed on the ground that Izumi is entitled to assert its counterclaim in the present Illinois action as a matter of law. The District

ignore this irrelevant rhetoric and recognize that the Brief in Opposition says nothing that fairly detracts from the straightforward nature of the questions presented and their certworthiness.

1. Philips' claim that the Court of Appeals did decide the question certified under § 1292(b) (Opp. at 10-11) is contradicted by the majority opinion's explicit acknowledgment (underscored by the dissent) that it was *not* answering that question. The majority acknowledged that "the Illinois [district] court did not mention" the judicial estoppel theory on which the majority was relying, and justified its use of that new theory by asserting the proposition that is the subject of the Petition's first question:

> Appellate review of the interlocutory order is not confined to the precise questions certified by the district court . . . . "[T]he nature and scope of our review are not limited to the certified question . . . ."

(Pet. App. A, 9a). The dissent pointedly objected that the majority opinion did not address the certified question. (Pet. App. A, 15a, 18a).

Indeed, Philips could only make its argument by incorrectly characterizing the certified question as whether Izumi's "counterclaims were barred" (Opp. at 6, 10), when in fact, the certified question was whether the counterclaims were barred by the compulsory counterclaim rule. Thus, the first question presented by the Petition is precisely the question raised by this Court *sua sponte* in *Yamaha Motor Corp., U.S.A. v. Calhoun* (No. 94-1387), 115 S. Ct. 1998 (1995).

2. The notion that the Court of Appeals' reliance on judicial estoppel was an exercise of that court's inherent

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Court, which has heard repeated attacks of this nature from Philips during the course of this litigation, gave them no credence when it based its decision entirely on an interpretation (which we and the dissent contend was incorrect) of Fed. R. Civ. P. 13(a).

disciplinary power (Opp. at 9-10) is equally at odds with the opinions below. There was no suggestion below that the Court of Appeals was purporting to impose any sanction for "bad faith" or "abuse of judicial process" or anything of the kind.[2] Quite to the contrary, the Court of Appeals explained that judicial estoppel "is an equitable principle that holds a party to a position on which it prevailed, as against later litigation arising from the same events." (Pet. App. A, 8a).[3] The majority invoked judicial estoppel as an alternative ground because it believed—erroneously in our view—that it had the authority to decide a § 1292(b) appeal on a basis different from the certified question, not as an exercise of its inherent disciplinary power.[4]

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[2] The fact that the Court of Appeals verbally equated judicial estoppel with "playing fast and loose with the courts" does not mean that it viewed Izumi's assertion of its counterclaim in Illinois as abusive conduct deserving punishment. Indeed, Senior Circuit Judge Friedman's dissent viewed it as an entirely proper assertion of a permissive counterclaim.

[3] The majority was simply relying on the dubious proposition of law that Izumi is "judicially estopped" from asserting even permissive antitrust counterclaims in Illinois because Izumi joined Windmere in stating that there was sufficient evidentiary overlap between Windmere's Florida antitrust counterclaims and Philips' Florida claims to warrant a single, rather than multiple trials, and because Izumi declined the Illinois District Court's suggestion that Izumi seek to add its own antitrust counterclaim to the Florida litigation where it was no longer a named party on any pending claim.

[4] The cases cited at Opp. 9-10 stand for no more than the basic principle that federal courts have inherent power to punish egregious conduct by parties before them. Indeed, the egregious conduct by the parties in these cases ranged from perjurious testimony upon which the outcome of a criminal case turned, *see United States v. Shotwell Mfg. Co.*, 355 U.S. 233, 240-42 (1957), to manufacturing a crucial piece of evidence as part of a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46 (1944). None of the cases cited by Respondents have anything to do with

3. Philips admits that two circuits do not recognize the judicial estoppel doctrine and does not dispute that the remaining circuits have vastly different requirements for invocation of the doctrine. Philips' effort to minimize the lower federal courts' uncertainty about the criteria for judicial estoppel rests on the same unjustified characterization of the circumstances and reasoning of the decisions below. It will not help future decision making to accept Philips' assertion that judicial estoppel is a proper sanction for "a litigant's duplicity or fraud" (Opp. at 13) or, even its more temperate statement, that it applies where a party has made a representation to one court that "directly contradicted its assertions to others" (*id.*). The Court of Appeals found neither in this case, and the question remains whether application of the expanding judicial estoppel doctrine can properly be based on more amorphous factors such as those relied on by the majority.

4. The review sought by this Petition is not of any issue of fact, but rather of questions of law concerning the Court of Appeals' jurisdiction and, if jurisdiction is found, the legal criteria for judicial estoppel.[5] In addition, there is no basis for Philips' contention that the interlocutory nature of the appeal below makes certiorari inappropriate. Where would it be better to review the scope of a court of appeals' jurisdiction under § 1292(b) —as this Court has reached out to do in *Yamaha Motor Corp., U.S.A. v. Calhoun* (No. 94-1387), 115 S. Ct. 1998 (1995)?

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the doctrine of judicial estoppel or the jurisdiction of a court of appeals to invoke it *sua sponte* as an alternative ground for deciding an appeal certified under § 1292(b).

[5] A Court of Appeals is, of course, not a finder of fact; at most, the judicial estoppel theory was based on the majority's view as to the legal consequences of undisputed matters of record. The dissent criticized the majority for making a determination that should in any event have been committed to the Illinois District Court's discretion in the first instance.

For these reasons and those stated in the Petition, certiorari should be granted or, at a minimum, the Petition should be held for appropriate disposition or consideration of the second question presented following the decision in *Yamaha* (No. 94-1387).

Respectfully submitted,

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